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7 dba KAISER HEALTH NEWS

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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 HENRY J. KAISER FAMILY FOUNDATION
14 dba KAISER HEALTH NEWS,

15 Plaintiff,

16 v.

17 U.S. CENTERS FOR MEDICARE AND
18 MEDICAID SERVICES; U.S. DEPARTMENT
19 OF HEALTH AND HUMAN SERVICES,

20 Defendants.

21 Case No. 19-cv-6130

22 **COMPLAINT FOR DECLARATORY AND
23 INJUNCTIVE RELIEF FOR VIOLATION
24 OF THE FREEDOM OF INFORMATION
25 ACT, 5 U.S.C. § 552 et seq.**

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1 Plaintiff HENRY J. KAISER FAMILY FOUNDATION dba KAISER HEALTH NEWS
2 (“KHN”), by its undersigned attorneys, allege as follows:

3 **INTRODUCTION**

4 1. KHN seeks access to key information regarding administration of one of the largest
5 healthcare providers in the United States. KHN requested that the U.S. Centers for Medicare and
6 Medicaid Services (“CMS”) produce documents reflecting Medicare Advantage Risk Adjustment
7 Data Validation (“RADV”) reviews for payment years 2001, 2012 and 2013 – including both the
8 audit spreadsheets, payment error calculations and any extrapolations. The RADV records
9 represent the federal government’s primary means for assuring the integrity of Medicare
10 Advantage billing, which accounts for some \$200 billion in taxpayer funds every year.

11 2. Medicare audits of every other arena of medicine, hospitals, nursing homes,
12 doctors, etc., are public records and many are posted by CMS on government websites for public
13 inspection and scrutiny. Medicare Advantage plans, which are run by some of the nation’s largest
14 and most profitable private health insurance companies, are being treated differently. These audits
15 are improperly being withheld by CMS, even though CMS estimates that these audits have
16 identified some \$650 million in improper charges. In spite of KHN’s efforts to obtain access to
17 this vital information, it has been withheld by CMS, necessitating the filing of this FOIA lawsuit.

18 3. In response to a recent report by the Inspector General of the U.S. Department of
19 Health and Human Services (“HHS”) that health insurers have overcharged Medicare by nearly
20 \$30 billion over the past three years, on September 17, 2019, U.S. Senators Sherrod Brown,
21 Bernard Sanders, Amy Klobuchar, Christopher S. Murphy, Richard Blumenthal and Debbie
22 Stabenow wrote to CMS Administrator Seema Verma demanding that CMS explain how the
23 agency plans to recoup taxpayer dollars that CMS used to overcompensate private insurers
24 involved in Medicare Advantage plans. See

25 <https://www.brown.senate.gov/newsroom/press/release/brown-colleagues-urge-cms-to-investigate-medicare-advantage-overbilling-protect-taxpayer-dollars-and-improve-care-for-older-ohioans>.

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1 4. KHN brings this action under the Freedom of Information Act, 5 U.S.C. § 552 *et*
2 *seq.*, as amended (“FOIA”), to enjoin the U.S. Centers for Medicare and Medicaid Services and
3 the U.S. Department of Health and Human Services from continuing to improperly withhold
4 agency records that are responsive to a FOIA request sent by KHN on July 3, 2019, a copy of
5 which is attached as Exhibit A. This FOIA action is necessary because CMS has not produced the
6 requested documents to KHN. The constructive denial of KHN’s Request is improper and in
7 violation of FOIA.

8 5. The Freedom of Information Act “focuses on the citizens’ right to be informed
9 about ‘what their government is up to,’ by requiring the release of “[o]fficial information that
10 sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for*
11 *Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citation omitted). “[D]isclosure, not
12 secrecy, is the dominant objective” of FOIA. *Dept. of Interior v. Klamath Water Users Protective*
13 *Ass’n*, 532 U.S. 1, 8, (2001) (internal quotation marks and citations omitted). KHN plays a critical
14 role in providing information to citizens about “what their government is up to.” Indeed, the First
15 Amendment’s guarantee of freedom of the press is meant to enable journalists to play an “essential
16 role in our democracy,” to “bare the secrets of government and inform the people.” *New York*
17 *Times. Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

18 6. CMS's own statistics show that more than 22.6 million Americans receive their
19 health care through Medicare Advantage insurers – more than one in three people on Medicare.
20 By this FOIA action, KHN seeks to shine a public light on CMS's activities on behalf of millions
21 of Americans and their families.

PARTIES

23 7. Plaintiff KHN is a non-profit news service committed to in-depth coverage of
24 health care policy and politics. KHN reports on how the health care system — hospitals, doctors,
25 nurses, insurers, governments, consumers — works. In addition to publishing on KHN.org, KHN-
26 authored stories are published by news organizations throughout the country.

27 8. Defendant Centers for Medicare and Medicaid Services is a component of
28 Defendant U.S. Department of Health and Human Services, itself a component of the Executive

1 Branch of the United States Government. Defendants are each an “agency” within the meaning of
 2 5 U.S.C. § 552(f). Plaintiff is informed and believes that CMS has possession and control of the
 3 records sought by the Request.

4 JURISDICTION

5 9. This Court has subject-matter jurisdiction over this action and personal jurisdiction
 6 over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 701-706, and 28 U.S.C. § 1331.

7 VENUE

8 10. Venue in the Northern District of California is proper under 5 U.S.C.
 9 § 552(a)(4)(B) as KHN’s FOIA request to CMS occurred within the City and County of San
 10 Francisco. For the same reason, venue also is proper under 28 U.S.C. § 1391(e).

11 11. Assignment to the San Francisco Division is proper under Civil Local Rule 3-2(c)
 12 and (d) because KHN’s FOIA request to CMS occurred within the City and County of San
 13 Francisco, within this District.

14 FACTS

15 12. Through a FOIA request that was emailed to CMS on July 3, 2019 and also sent by
 16 mail on July 8, 2019, KHN Senior Correspondents Anna Maria Barry-Jester and Fred Schulte,
 17 while employed by KHN, requested access to and copies of RADV reviews for the payment years
 18 2011, 2012 and 2013, including both the audit spreadsheets and payment error calculations,
 19 including any extrapolations. In its request, KHN expressly disclaimed interest in the names, or
 20 dates of birth of any Medicare beneficiaries. In formulating this FOIA request, KHN was
 21 informed by CMS’ press office that at least 90 of these audits have been conducted for these three
 22 years. KHN also requested all correspondence, memoranda, emails or other records of any
 23 meetings, communications or enforcement actions concerning these audits and Medicare
 24 Advantage providers involved. Finally, KHN also requested all correspondence, memoranda,
 25 emails or other records concerning the January 2017 decision to move the RADV audit program
 26 from the CMS Center for Medicare to the agency’s Center for Program Integrity. KHN requested
 27 that the responsive documents be produced by CMS in an electronic format.

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1 13. KHN also requested that since the release of the requested information is “clearly
2 in the public interest” and because KHN is a media requester, that CMS waive any fees for
3 production of the requested documents. KHN also asked that its request be treated as a simple
4 request under CMS rules. KHN’s FOIA request is attached as Exhibit A.

5 14. As of the filing of this Complaint, more than two months have elapsed since KHN
6 sent its Request. Because CMS failed to further respond, KHN is deemed to have exhausted its
7 administrative remedies with respect to the Request under 5 U.S.C. § 552(a)(6)(C)(i).

FIRST CAUSE OF ACTION

(Violation of FOIA)

10 15. CMS and HHS have a legal duty under FOIA to determine whether to comply with
11 a request within 20 days after receiving the request, and also have a legal duty to immediately
12 notify the requester of the agency's determination and the reasons therefore. KHN has a legal
13 right under FOIA to obtain the agency records they requested in its Request, and there exists no
14 legal basis for CMS's failure to respond to KHN's request and to make these records available to
15 KHN.

16 16. CMS and HHS's failure to make promptly available the records sought by KHN's
17 Request violates FOIA, 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A)(ii), and applicable regulations
18 promulgated thereunder.

PRAAYER FOR RELIEF

WHEREFORE, Plaintiff KHN request the Court award it the following relief:

- A. Declare that CMS and HHS violated FOIA in their failure to respond to KHN's FOIA Request;
- B. Order CMS and HHS to immediately disclose the requested records to KHN and enter an injunction prohibiting CMS and HHS from continuing to withhold the requested records;
- C. Award KHN its reasonable costs and attorney's fees;
- D. Grant such further relief as the court may deem just and proper.

Dated: September 26, 2019

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Thomas R. Burke
THOMAS R. BURKE

Attorneys for Plaintiff
HENRY J. KAISER FAMILY FOUNDATION
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